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SUPREME COURT, U.S.

No. 99-1561

In The

Supreme Court of the United States

RUBY and FELIX OLIVER,

Petitioners,

vs.

SIBU P. SAHA, M.D. and
CARDIOVASCULAR AND
THORACIC ASSOCIATES, P.S.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Kentucky Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

The Petition for Writ of Certiorari presents no questions for review. Petitioners seek review of a denial of a motion for discretionary review by the Kentucky Supreme Court, but identify no questions of federal law implicated in that denial.

PARTIES

The Petitioners are Ruby and Felix Oliver.

The Respondents are Sibu P. Saha, M.D. and Cardiovascular and Thoracic Associates, P.S.C.

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CITATIONS

Petitioners seek review of an unpublished Order Denying Discretionary Review of the Kentucky Supreme Court. Attached as Appendix "A." That Motion for Discretionary Review sought the reversal of an unpublished Opinion Affirming of the Kentucky Court of Appeals. Attached as Appendix "B." In the Kentucky Court of Appeals, Petitioners sought to overturn a jury verdict entered against them in Fayette Circuit Court. Attached as Appendix "C."

STATEMENT OF JURISDICTION

Petitioners seek to invoke jurisdiction under 28 U.S.C. § 1257(a); however, as their Petition for Writ identifies no issues of federal law, jurisdiction is inappropriate. Furthermore, in the state court proceedings below, Petitioners failed to file a timely motion for discretionary review in the Kentucky Supreme Court and are thus barred from pursuing an appeal.

CONSTITUTIONAL PROVISIONS/ STATUTES/REGULATIONS

28 U.S.C. § 1257(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution,

treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

Kentucky Rule of Civil Procedure 76.20(2)(b)

> A motion for discretionary review by the Supreme Court of a Court of Appeals decision shall be filed within 30 days after the date of the order or opinion sought to be reviewed unless (i) a timely petition under Rule 76.32 or (ii) a timely motion for reconsideration under Rule 76.38(2) has been filed or an extension of time has been granted for that purpose, in which event a motion for discretionary review shall be filed within 30 days after the date of the order denying the petition or motion for consideration or, if it was granted, within 30 days after the date of the opinion or order finally disposing of the case in the court of Appeals.

Kentucky Rule of Civil Procedure 76.20(2)(d)

> The failure of a party to file a Motion for Discretionary Review within the time specified in this Rule, or as extended by a previous order, shall result in a dismissal of the Motion for Discretionary Review.

COUNTERSTATEMENT OF THE CASE

I. Course of Proceedings and Disposition of the Case Below.

This medical malpractice suit arose as a result of a November 1, 1993, surgery to remove a mediastinal cyst from below the clavicle of Ruby Oliver. On October 31, 1993, Ruby and Felix Oliver met with Dr. Saha and discussed her condition and future treatment. On that day, Mrs. Oliver signed an operative permit form acknowledging that her proposed treatment had been explained to her satisfaction. The next day Dr. Saha performed the surgery, a thorocotomy. In the course of the procedure, Mrs. Oliver sustained a broken rib. Following this surgery, she developed a condition known as post-thorocotomy pain syndrome and has continued to experience pain.

On September 16, 1994, the Olivers filed suit in Fayette Circuit Court. The complaint alleged that Dr. Saha failed to disclose less invasive procedures, to treat properly the condition, to mention possible complications, or to obtain the proper informed consent. A claim for loss of consortium was asserted by Mr. Oliver.

The case went to trial March 2 through March 5, 1998. The Olivers were represented by counsel at trial.

At trial, both sides presented expert testimony. The Olivers presented testimony that Dr. Saha should have performed a less invasive procedure and that he should have informed her of other less invasive alternatives. The Olivers argued that as these alternatives were not explained, she did not give informed consent. Dr. Saha

presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent. At the close of all the evidence, the judge read the instructions to the jury. A unanimous jury found that Sibu P. Saha, M.D. did not fail to perform his duty to inform Mrs. Oliver of the risks of the surgical procedure and of alternative procedures that were medically available and that he exercised the appropriate degree of skill in his treatment of Mrs. Oliver. On March 30, 1998, the Olivers moved to set aside the verdict and for a new trial. The circuit court judge overruled the motion from the bench and then issued and had entered a written order overruling the motion on April 7, 1998. The Olivers appealed from the trial judgment and verdict dismissing their suit and from the order overruling their motion to set aside and for a new trial.

On July 16, 1998, the Kentucky Court of Appeals affirmed on the grounds that the Olivers failed to present any error committed by the trial court and that the Olivers instead simply presented a recitation of contested matters presented to the jury.

On August 10, 1999, the Olivers served their Motion for Discretionary Review. On August 12, 1999, the Respondents filed a Motion to Dismiss the Untimely Motion for Discretionary Review. By Order dated August 31, 1999, the Kentucky Supreme Court denied Respondents' motion without comment.

Respondents filed a Response to Motion for Discretionary Review on September 14, 1999. On November 10, 1999, the Kentucky Supreme Court entered an Order Denying Discretionary Review without comment.

II. Correction of Misstatements in the Petition.

Pursuant to United States Supreme Court Rule 15.2, the Respondents bring to the Court's attention the following misstatements of fact contained in the Petition.

Respondents have not made an admission of negligence, erroneous diagnosis, failure to fully disclose or permanent disability.

Respondent Sibu P. Saha, M.D., has not committed perjury regarding lawsuits alleging medical malpractice.

Respondent Sibu P. Saha, M.D., did not guarantee that the lesion was benign.

Neither the Supreme Court of Kentucky nor the Court of Appeals of Kentucky ruled that the trial court committed any error.

Dr. Dieter did not testify that it was an act of negligence not to have the x-rays in the operating room nor did he testify that the operation should have been done by the VATS procedure.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Respondents respectfully oppose the Petition for Writ of Certiorari. The Petition for Writ raises no issues of federal law; rather, the Petition seeks to have the Court overturn the verdict of a state court based upon a review of disputed evidence that a jury has considered. Finally, Petitioners failed to comply with state court appellate

procedure and are thus barred from pursuing this Petition for a Writ of Certiorari.

I. THE PETITION FOR A WRIT OF CERTIORARI MUST BE DENIED AS NO ISSUES OF FEDERAL LAW ARE RAISED

Section 1257 of title 28 of the United States Code defines the Supreme Court's appellate jurisdiction over state court rulings. It provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under the United States.

In sum, only those state court decisions bearing upon questions of federal law are within the Court's jurisdiction. Unless a federal question has been raised and decided in the state court below, the appellate jurisdiction of the Supreme Court fails. *Illinois v. Gates*, 462 U.S. 213, 222, 103 S.Ct. 2317, 76 L. Ed. 2d 527 (1983). The Petition for Writ identifies no federal law issues and, in fact, none are implicated by either the denial of the motion for discretionary review by the Kentucky Supreme Court or by the Opinion Affirming of the Kentucky Court of

Appeals. The Petition for Writ presented to this Court merely recites a litany of disputed facts which, in Petitioners' opinion, would have supported a jury verdict in their favor. Petitioners identify no issues of federal law. In fact, Petitioners have never identified issues of law or error on the part of the trial court at all. (Opinion Affirming, p. 6.) In affirming the jury verdict, the Kentucky Court of Appeals relied exclusively upon state law stating: "It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its findings on conflicting evidence." (Opinion Affirming p. 5) (citing *Stewart v. Sizemore*, 306 S.W. 2d 821, 823 (Ky. 1957); *Fields v. Baker*, 329 S.W. 2d 376 (Ky. 1959); *Horton v. Union Light, Heat & Power*, 690 S.W. 2d 382, 385 (Ky.1985)). The court continued: "In our review of the trial [record], we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings." (Opinion Affirming p. 6.) As is made clear in the Opinion Affirming, under Kentucky law, the state appellate courts will not search the record for errors, but, rather, confine their consideration to errors identified by the briefs. *Bingham v. King*, 444 S.W. 2d 123, 123 (Ky. 1969), *Milby v. Mears*, 580 S.W. 2d 724, 727 (Ky. App., 1979) (citing *Ballard v. King*, 373 S.W. 2d 591 (Ky. 1979)).

Clearly, the issues presented in the courts below were issues of fact and state law. Petitioners raise no questions of federal law and none have been passed upon by the state courts. Therefore the U.S. Supreme Court does not have jurisdiction over this matter and the Petition must be denied.

II. THE PETITION FOR WRIT MUST BE DENIED AS PETITIONERS FAILED TO FOLLOW PROPER STATE APPELLATE PROCEDURE.

Petitioners failed to follow the state court procedure for filing of a motion for discretionary review. Failure to follow the proper state procedure alone provides grounds for denial of the Petition. *Hammerstein v. Superior Court*, 341 U.S. 491, 492, 71 S.Ct. 820, 95 L.Ed. 1135 (1951).

The Kentucky Rules of Civil Procedure provide that a motion for discretionary review by the Supreme Court of a Court of Appeals decision must be filed within twenty days of the date of the opinion to be reviewed. Ky. R.C.P. 76.20(2)(b). The rules further provide that failure to comply with the filing deadlines "shall result in a dismissal of the Motion for Discretionary Review." Ky. R.C.P. 76.20(2)(d).

The Kentucky Court of Appeals rendered its decision on July 16, 1999. Petitioners' time to file a motion for discretionary review lapsed on August 5, 1999. Petitioners did not serve their Motion for Discretionary Review until August 10, 1999. Petitioners filed no petition for rehearing or reconsideration by the Court of Appeals. As Petitioners failed to comply with the proper state court procedure in the prosecution of their appeal, the Petition for Writ of Certiorari must be denied.

CONCLUSION

For the foregoing reasons, this Court should deny review of the Kentucky Supreme Court's decision.

Respectfully submitted,

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APPENDIX

Supreme Court of Kentucky

99-SC-751-D
(98-CA-1036-MR)

RUBY OLIVER AND FELIX L. OLIVER MOVANTS

FAYETTE CIRCUIT COURT
V. 94-CI-2797

SIBU P. SAHA, M.D., ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motion for discretionary review of the decision of the Court of Appeals is denied.

ENTERED November 10, 1999.

/s/ Joseph E. Lambert
Chief Justice

RENDERED: July 16, 1999; 10:00 a.m
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001036-MR

RUBY OLIVER AND FELIX L. OLIVER APPELLANTS

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA OVERSTREET, JUDGE
ACTION NO. 94-CI-002797

SIBU P. SAHA, M.D., AND
CARDIOVASCULAR AND THORACIC
ASSOCIATES, PSC APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: BUCKINGHAM, COMBS, and McANULTY, Judges.

McANULTY, JUDGE: Ruby (Ruby) and Felix (Felix) Oliver, both proceeding pro se, appeal from the March 30, 1998, trial judgment and verdict dismissing their medical malpractice suit with prejudice and from the April 7, 1998, order overruling their motion to set aside verdict and for a new trial. A unanimous jury found that the defendant. Sibu Saha, M.D., did not fail to perform his duty to inform Ruby of the risks of the surgical operation and of any alternative procedures which were medically available or his duty to exercise the appropriate degree of skill in his treatment of Ruby. Having reviewed the trial

court record, and the parties' respective briefs, we find no error. Therefore, we affirm.

At the outset of this opinion, the Court notes that Ruby attached several exhibits to her brief which were not presented to the jury at trial. Because those "exhibits" are not a part of the record on appeal, they have been disregarded in our consideration of the merits of the appeal. *Croley v. Alsip*, Ky., 602 S.W.2d 418 (1980).

This lawsuit arose as a result of a November 1, 1993, surgery to remove what was later identified as a mediastinal cyst from below Ruby's clavicle. Prior to the surgery, Ruby and her husband, a licensed and practicing radiologist, met with Dr. Saha to discuss Ruby's condition and future treatment. Ruby neither sought a second opinion, nor did she ask or seek to ask any questions of Dr. Saha regarding the proposed surgery. On October 31, 1993, prior to surgery, Ruby signed an operative permit form in the presence of a witness which stated in part that:

> 5. I have talked to the above named doctor and he has explained to my satisfaction the nature and purpose of the operation, with possible alternative methods of treatment as well as complications. No guarantee or assurance has been given to me by anyone as to the results that may be obtained by surgery or anesthesia.

Drs. Saha, Rogers, Earle, and Wilcox were the named physicians on the operative permit form. The following day, Dr. Saha performed a thorocotomy, which is an invasive procedure, to remove the mass. She sustained one (1) broken rib in the course of the operation. Following this procedure, Ruby developed a condition known as post-

thorocotomy pain syndrome and has continued to experience pain.

Ruby and Felix filed a complaint on September 16, 1994, against Michael G. Estridge, M.D., Lexington Clinic, P.S.C., Sibu P. Saha, M.D., and Cardiovascular and Thoracic Associates, P.S.C. for the failure to properly evaluate, diagnose, and treat the condition from which Ruby was suffering and that this failure caused Ruby to incur permanent injuries and damages. As to Dr. Saha in particular, the complaint alleged that he failed to disclose less invasive procedures, to properly treat the condition, to mention possible complications, or to obtain the proper informed consent. Felix's claim was for the loss of society and services of consortium of Ruby, his wife. The claims against Dr. Estridge and Lexington Clinic were later settled and dismissed. The claims against Dr. Saha and Cardiovascular and Thoracic Associates were not settled, and proceeded to a trial by jury from March 2 through March 5, 1998. Ruby and Felix were represented by counsel at trial.

At trial, both sides presented expert testimony regarding the appropriate procedure to follow in Ruby's situation and whether Dr. Saha obtained informed consent from Ruby for the operation. Ruby and Felix presented testimony that Dr. Saha should and could have performed a less invasive surgery (either a video-assisted thoroscopic surgery or a needle aspiration), and that Dr. Saha should have told Ruby of these other less invasive procedures available to her. Ruby argued that due to Dr. Saha's failure to tell her of the other options available and the possible side effects of the procedure performed, she did not give an informed consent for the thorocotomy. On

the other hand, Dr. Saha presented testimony that a thorocotomy was the only viable option under the circumstances and that he did receive informed consent from Ruby for the proposed operation.

At the close of the evidence, the judge read the instructions and interrogatories to the jury. After reviewing the conflicting evidence presented at trial, the jury returned a unanimous verdict for the defense on both instructions. The lawsuit was dismissed with prejudice on March 20, 1998.

On March 30, 1998, Ruby and Felix moved to set aside the verdict and for a new trial. The grounds cited in the motion were a defense witness's contact with the jury during a break in the course of the trial, errors in the instructions relating to causation, and other errors at trial. Following an oral argument on the motion, at which time only the first two grounds were argued, Judge Overstreet orally overruled the motion from the bench and then issued and had entered a written order overruling the motion on April 7, 1998. This appeal followed.

Ruby's brief filed in support of her appeal to this Court appears to be a recitation of the contested matters presented to the jury, along with some statements which are admittedly not a part of the record on appeal. The appellees have argued that this Court should not disturb the jury verdict and that Ruby and Felix have failed to present any error committed by the trial court in their brief. We agree with the appellees.

It is well settled in Kentucky that a reviewing court may not usurp the province of the jury and disturb its

findings on conflicting evidence. In *Stewart v. Sizemore*, Ky., 306 S.W.2d 821, 823 (1957), the Court stated that:

> it is not within the province of the Court to usurp the prerogative of a jury and decide as a matter of law which set of witnesses is worthy of belief. A definite issue was developed on the point in question, which was supported by substantial competent evidence on behalf of each of the parties, and neither the trial court nor this one may exercise independent judgment in evaluating this particular testimony.

Id. at 823. Citing the *Stewart* case, the Court in *Fields v. Baker*, Ky., 329 S.W.2d 376 (1959), held that when there was evidence on each side that was substantial enough to go to a jury, a reviewing court could not usurp the prerogative of the jury and disturb its findings. In *Horton v. Union Light, Heat & Power Co.*, Ky., 690 S.W.2d 382, 385 (1985), the Supreme Court stated that "an appellate court must not substitute its findings of fact for those of the jury if there is evidence to support them." In our review of the trial, we found substantial evidence presented at trial to support the jury's unanimous verdict. Therefore, we will not disturb the jury's findings.

Ruby also failed to present any errors of the trial court in her brief. "It is incumbent upon the litigant who seeks reversal of a trial court's judgement to demonstrate to an appellant court that the trial court has committed error which is prejudicial to the substantial rights of the litigant." *Bingham v. Davis*, Ky., 444 S.W.2d 123, 123 (1969). Citing *Ballard v. King*, Ky., 373 S.W.2d 591 (1963), this Court later ruled that "a reversing court will generally confine itself to errors pointed out in the briefs and

will not search the record for errors." *Milby v. Mears*, Ky.App., 580 S.W.2d 724, 727 (1979). Because Ruby failed to demonstrate that the trial court committed any error, her appeal must fail.

Based upon the foregoing, the judgment of the Fayette Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ruby Oliver, Pro se
Felix L. Oliver, Pro se
Lexington, KY

BRIEF FOR APPELLEE:

John M. Famularo
Darren J. Duzyk
Lexington, KY

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
THIRD DIVISION
NO. 94-CI-2797

RUBY OLIVER, ET AL. PLAINTIFFS,

VS. **TRIAL VERDICT AND JUDGMENT**

(Filed Mar. 20, 1998)

SIBU SAHA, M.D., ET AL. DEFENDANTS

* * *

The parties represented by counsel appeared this 2nd through 5th of March, 1998 and thereupon came the following jury, to-wit:

Jeff Nicholson	Henry Eminger
Robert Maxwell	Karen Acar
Terry Peniston	Dan Young
Ray Ingold	Betty Gillispie
Michael Clemmons	Joseph Lyons
Gracie Wiley	David Napier
Sherman Fields II	Celia L. Thornsburg

who were duly sworn to try the issues herein.

The trial progressed and plaintiffs having announced closed, the defendants moved for a directed verdict. The motion of the defendants was overruled.

The trial continued and being concluded, defendants renewed their motion for a directed verdict which was overruled. The plaintiffs also made a motion for a directed verdict which was overruled. At the conclusion of all testimony, Joseph Lyons and David Napier were

dismissed from further consideration in this action as the alternate jurors.

The jury retired and returned into Court returning the following verdict, to-wit.

INTERROGATORY NO. 1

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 2 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES ____
NO X

Sherman Fields
FOREPERSON (if unanimous)

INTERROGATORY NO. 2

Do you believe from the evidence that the Defendant, Sibu Saha, M.D., failed to perform his duty as forth Instruction No. 3 and that such failure was a substantial factor in bringing about the injury to the Plaintiff, Ruby Oliver?

YES ____
NO X

Sherman Fields
FOREPERSON (if unanimous)

Said verdict was accepted by the Court and the jury was excused from further service in this case.

Based upon said verdict, it is hereby ***ORDERED AND ADJUDGED*** that the above styled matter is dismissed

with prejudice as to the defendants, SIBU SAHA, M.D. and CARDIOVASCULAR AND THORACIC ASSOCIATES, P.S.C. and plaintiffs are not to recover any damages herein.

It is further ***ORDERED AND ADJUDGED*** that said defendants shall recover from the plaintiffs their costs incurred in this action.

Dated this 19th day of March, 1998.

/s/ Rebecca Overstreet
JUDGE

ENTRY OF ORDER PURSUANT TO RFCC 16 B.2.
IN AS MUCH AS COUNSEL FOR PLAINTIFF HAS FAILED TO RETURN THE ORDER TO THE UNDERSIGNED WITHIN THREE BUSINESS DAYS OF RECIEPT OF THE ORDER HEREIN:

/s/ Charles Taylor
ATTORNEY FOR DEFENDANT,
SIBU SAHA, M.D.

Served by mailing a true copy to:

Charles Taylor, Esq.
177 North Limestone
Lexington, Kentucky 40507

John Famularo, Esq.
250 W. Main St.
Suite 2300
Lexington, KY 40507

this 20 day of March, 1998.

/s/ Robert M. True
CLERK, FAYETTE CIRCUIT COURT